

CRIMINAL LAW
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SPRING 2014
GRADE: A

INTRODUCTION

- **PROSECUTORIAL DISCRETION:** decides 1) *whether* to bring charges, 2) against *whom*, and 3) *what* charges to bring
 - 1) *Attica*: denies inmates' request for an order of mandamus requiring prosecutor to file charges against state corrections officers involved in prison riot
 - Separation of powers doctrine, evidentiary concerns (prosecutors' files are closed and confidential), resource constraints
 - 2) **SELECTIVE ENFORCEMENT CRITERIA**
 - *Armstrong*: denies discovery motion to show prosecutors' selective enforcement criteria was impermissibly based on racial discrimination (i.e. a discriminatory effect (sentencing differences) + discretionary purpose)
 - **"Claimants must show need that similarly situated people of a different race were not prosecuted"**
 - An extremely high threshold (almost never met) to deter "fishing expeditions" and protect confidentiality of prosecutor's minimum standards
 - 3) **PLEA BARGAINING:** as long as there's evidence to prove any charge, prosecutor has complete discretion
 - Rationale: resource constraints, reward the contrite who accept responsibility for actions
 - Critiques: penalizing those who go to trial, vast differentials in sentencing due to recidivist statutes (juries are not told about them either)
 - Plea "not only must be **voluntary**, but must be **knowing**, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences" (*Brady*)
 - Must be free from threats, violence, direct/implied promises, or improper influence (i.e. bribes) from state's agents (*Bram*)
 - Only covers direct consequences (not collateral ones) of a conviction
 - Maximum sentence, minimum sentence exposure (*Jamison v. Klem*)
 - *Padilla v. Kentucky*: SCOTUS held that attorneys are required to advise clients about the possibility of deportation (not clear if direct or collateral consequence)
 - If plea is defective, rejected, and defendant is convicted, court can require prosecution to reoffer the plea, adhere to post-trial sentence, or issue an intermediate sentence (*Lafler v. Cooper*)
 - If prosecution fails to honor commitments in plea, then defendant can withdraw it (*Santobello v. New York*)
 - Note that many plea bargains say that prosecutor will "recommend" a sentence to judge
 - So long as prosecutor has probable cause to bring the higher charge, he has complete discretion to bring it, threaten to bring it, or not bring it at all (*Bordenkircher v. Hayes*)
 - NOTE: does not apply when prosecutor threatens to charge friend/co-conspirator because since defendant can't internalize costs and benefits, the decision is not "knowing and voluntary"
- **THE JURY:** final check on the prosecutor's action at trial
 - Court incorporated Sixth Amendment's right to jury trial in criminal cases against the states via the Fourteenth Amendment's Due Process clause because "denying a criminal defendant the opportunity to be tried by jury was *fundamentally unfair*" (*Duncan v. Louisiana*)
 - Petty offenses" carrying less than six months imprisonment need not require jury trial (*Baldwin v. NY*)
 - Nullification: ultimate check on prosecutors, completely unreviewable in criminal cases (*Connecticut v. Johnson*)
 - **Federal standard:** recognizes that jury's "unreviewable and unreversible power" to nullify is desirable so long as it is used sparingly, and thus refuses to allow instructions to jury telling them of this power (*Dougherty*)
 - Followed in federal system and nearly all the states (IN, MD, GA)
 - Can only remove a juror if "there is unambiguous evidence of a juror's refusal to follow the judge's instructions," not mere skepticism about credibility of evidence or witnesses (*Thomas*)
 - If "any reasonably possibility" juror is following instructions, cannot remove (*Williams v. Cavazos*)

LEGALITY

- **A person cannot be convicted and punished by the state unless his conduct was defined as criminal**
 - Criminalized conduct must be established by **STATUTE**
 - *Mochan*: majority's position that a judge can criminalize any act that "injuriously affects public morality, or obstruct, or pervert public justice" through common law is widely rejected now

- **RULE OF LENITY**: used when statutory language is *ambiguous*, but not constitutionally vague, to “resolve ambiguities in the statute in the defendant’s favor in criminal cases”
 - Scalia view: invoke lenity when language itself is ambiguous and adopt *narrowest plausible interpretation*
 - Breyer view: invoke lenity “as a last resort” when all other techniques of statutory interpretation (e.g. LH) have failed
 - **Judicial discretion**: do not want judges making decision of whether behavior “x” is included in this statute (with potentially a much higher punishment); invoking lenity has effect of getting the legislature to fix a loophole if it sees fit, while the reverse rarely holds true
 - **McBoyle**: reading language narrowly, an airplane is not a “vehicle” under National Motor Vehicle Theft Act
 - No notice issue (stealing plane is obviously wrong) or legislative purpose (would definitely include plane)
 - *But see Smith*: not invoking rule of lenity, court holds that trading a gun in a drug transaction is “use” within meaning of the statute (thus invoking five-year minimum sentence)
- **LEGALITY AS A CONSTITUTIONAL PROBLEM**
 - (1) **Statute must provide adequate NOTICE: no RETROACTIVE criminality**
 - ***Keeler***: cannot convict man of murder by kicking unborn fetus to death because (1) CA penal code vests the power to define crimes *exclusively* in the legislature (not the judiciary) and thus cannot expand definition of murder, and (2) assuming *arguendo* that court could expand the definition, it could apply only prospectively, not retroactively (because doing so would violate *notice* requirement)
 - “An **unforeseeable** judicial enlargement” of an existing statute violates notice
 - Such expansion in this case of murder would violate notice to Keeler since laws of most states do not consider feticide murder, and no CA decision existed that killing fetus was murder
 - ***Bouie v. City of Columbia***: the Due Process restrictions on courts include same ex post facto limits applicable to legislatures, especially when applied to previously *innocent* conduct
 - “An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law” and since state legislatures cannot do it, neither can courts
 - ***Rogers v. Tennessee***: retreated from *Bouie* and held that TN’s retroactive application of abolishing the year-and-a-day rule did not violate Due Process or notice requirement (outdated relic, abolished in most states)
 - “Judicial alteration of a common law doctrine of criminal law violates the principal of fair warning, and hence must not be given retroactive effect, only where it is **unexpected and indefensible** by reference to the law which had been expressed prior to the conduct in issue’.”
 - (2) **Statute must CONTROL DISCRETION afforded to other actors (prosecutors, police force)**
 - Legislature must make basic policy call
 - ***City of Chicago v. Morales***: ordinance prohibiting loitering in a public place by criminal street gang members is unconstitutionally vague on due process grounds
 - (1) **Vagueness test**: statute is so “vague and standardless that it leaves the public uncertain as to the conduct it prohibits”
 - High bar: only three justices joined this portion of opinion because dispersal order is clear
 - Crime must be sufficiently specific so people can modify their conduct
 - Crime must contain a voluntary choice/act, not mere “being” (***Jones v. City of LA***, striking down ordinance for targeting homeless people’s existence)
 - (2) **Arbitrary/discretionary enforcement test**: does it give minimal guidelines to police?
 - Allows police to determine what conduct is permissible, captures too much innocent activity
 - Amended to be “loitering PLUS harmful purpose of establishing control over areas to use for illegal activity” and passed constitutional muster (incorporated O’Connor’s suggestions)
 - ***Papachristou v. City of Jacksonville***: struck down vagrancy statute for capturing way too much innocent conduct and providing “no standards to govern the exercise of discretion” given to law enforcement

CULPABILITY

- Requires both actus reus (voluntary act or conduct) and mens rea (requisite state of mind)
- **ACTUS REUS/OMISSIONS**
 - The commission of some **voluntary act** that is prohibited by law (***Martin***)
 - The “act” is a *verb* in the statute, an affirmative act of doing something/not doing something
 - In ***Martin***, key elements of crime were appearing in public & manifesting drunken condition, and thus both need to be voluntary (i.e. police cannot drag Martin on a public highway)
 - MPC 2.01 requires “a voluntary action” and excludes reflexes, hypnosis, sleep-related acts
 - **Omissions** can be basis of criminal liability ONLY if a **legal duty of care existed**, (***Jones***, reversing conviction for neglecting infant to point of death because there was no finding of a legal duty of care)
 - 1) Written directly into **STATUTE** by legislature
 - Usually drawn narrowly, impose minimum penalty (\$100 fine), due to autonomy concerns

- Judges read statutory language narrowly, not wanting to indirectly expand liability
 - *Pope*: no legal duty owed to woman's child by old church lady who took them in to stop mother from beating child to death because she was not "responsible for the minor child" as provided by the statute, not going to usurp role of the mother (who was present)
- 2) **STATUS RELATIONSHIPS** (from common law): parent/child, spouse/spouse, train/passenger, innkeeper/customer
 - Judges rarely expand them beyond formal legal categories since it is basically common-law judge creation, raising notice/separation of powers/legislative usurpation issues
 - *Beardsley*: no legal duty owed to lover to call medical attention resulting in her death from an overdose because no formal legal relationship existed between them
 - *Carroll*: court recognizes legal duty owed from stepmother to stepchild because she is the "functional equivalent of a parent" (turns on nature of relationship between parties, not formalities)
 - But see *Miranda*: court refused to recognize legal duty owed from live-in boyfriend to baby girl of girlfriend because of line-drawing problems and notice issues
- 3) **CONTRACTUAL RELATIONSHIP**
- 4) When one **UNDERTAKES** a duty and **FORECLOSES** the person from seeking help elsewhere
- 5) When one **CREATES** the peril that endangers the person (even if accidental or negligent)
 - If risk created is negligent (accidentally pushing someone off dock), then a willful failure to rescue can result in prosecution for murder (not merely involuntary manslaughter or negligent homicide)
 - Legal duty existed when defendants accidentally started fire and then did not report it, upheld convictions for involuntary manslaughter (*Levesque*)
 - Legal duty attaches even if person *voluntarily* chooses to place herself in danger (*R. v. Evans*, upholding conviction for supplying heroin to sister and then not calling for help when she overdosed)
- Possession (MPC 2.01(4)): counts as an **act** if possessor "knowingly procured or received" it or "was aware of his control thereof for a sufficient period to have been able to terminate its possession"
- **MENS REA**
 - The **awareness or intention** that must accompany the prohibited act, under the terms of the statute defining the offense
 - **COMMON LAW**
 - *Cunningham*: reversing conviction under Offense Against Persons Act because when defendant broke gas meter off wall, he lacked requisite mens rea to satisfy "malice" element of statute (not "wicked")
 - Baseline level of mens rea is **RECKLESSNESS**: "the accused has foreseen that the particular kind of harm might be done (subjective awareness) and yet has gone on to take the risk of it"
 - Malice means "foresight of the prohibited consequence" [prevailing common law view]
 - *Faulkner*: reversing conviction under Malicious Damage Act because sailor only accidentally set fire to ship while committing theft of rum, rejects collateral culpability (need mens rea with respect to crime charged)
 - **RECKLESSNESS**: "accused knew that the injury would be the probable result of his unlawful act, and yet did the act reckless of such consequences"
 - **NEGLIGENCE**: jurisdictional split between civil standard and criminal standard
 - *Hazelwood*: upholding conviction for tanker captain who spilt oil under ordinary tort/civil negligence standard (an "ordinary" deviation from standard of reasonable care)
 - *Santillanes*: child abuse statute requires a showing of criminal negligence (a "gross deviation" from standard of reasonable care)
 - **MPC 2.02 (p. 1202)**
 - (1) Except for narrow strict liability offenses (2.05), a person is not guilty unless he acted:
 - **PURPOSELY**: [if a conduct or result element] it must be his "**conscious object** to engage in conduct of that nature or **to cause such a result**" AND [if an attendant circumstances element] he is "**aware** of the existence of such circumstances or he **believes or hopes that they exist**"
 - **Conduct/result**: *specific intent* to engage in conduct and/or cause result
 - **Attendant circumstances**: aware of them, or hope/believe they exist
 - **KNOWINGLY**: [if a conduct or attendant circumstances element] he is "**aware** that his conduct is of that nature or that such circumstances exist" AND [if a result element] he is "aware that it is **practically certain** that his conduct will cause such a result"
 - **Conduct/attendant circumstances**: aware that conduct is of such nature or that circumstances exist (knowledge standard)
 - **Result**: practically certain that his conduct will cause such a result
 - **RECKLESSLY**: he "**consciously** disregards a **substantial and unjustifiable risk** that the material element exists or will result from his conduct"; such disregard must involve a "**gross deviation**" from the standard of care that a law-abiding person would observe in actor's situation
 - **Subjective awareness of the existence of a substantial and unjustifiable risk**

- Defendant needs subjective awareness that risk is *substantial*
 - Minority approach uses objective test: defendant need only be aware of risk, and then jury determines whether it's substantial or not (*Hall*)
 - But most jurisdictions use an objective, reasonable person standard to judge whether taking the risk is *justifiable* (not the defendant's subjective impressions, gun case)
 - **NEGLIGENTLY**: he “**should be aware** of a **substantial and unjustifiable risk** that the material element exists or will result from his conduct”; actor's failure to perceive risk (given nature, degree, and circumstances known to actor) should involve a “**gross deviation**” from standard of care that a **reasonable** person would observe in actor's situation
 - No subjective awareness of the existence of a substantial and unjustifiable risk
 - Requires **criminal negligence**: a “gross deviation” from standard of care (*Santillanes*)
 - (3): When mens rea standard is not prescribed in the statute, default rule that one must at least be **RECKLESS** with respect to every single material element [DEFAULT]
 - (4): If law has a mens rea standard but does not specify or distinguish among elements, default rule that the listed standard applies to all elements unless a contrary purpose plainly appears [DEFAULT]
- **WILLFUL BLINDNESS**: how to distinguish recklessness from knowledge?
 - (1) **JEWELL**: knowledge is established so long as defendant's ignorance of the fact “was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with **a conscious purpose to avoid learning the truth**”
 - No knowledge/high probability requirement is present at all, most prosecution-friendly standard
 - (2) **MPC 2.02(7)**: [when knowledge of a fact is an element of an offense], such knowledge is established if a person is aware of a “**high probability of its existence**”, unless he actually believes that it does not exist
 - Subjective option to deny knowledge altogether
 - (3) **POSNER (Giovanetti)**: ostrich instructions to be reserved for defendants, who know or suspect that they are involved in shady dealings, engage in “**deliberate, active avoidance**” to avoid finding out the truth
 - Excludes carelessness (not asking), which could be sufficient under *Jewell*, most defendant-friendly
 - (4) **SCOTUS** addressed issue for federal prosecutions in *Global-Tech Appliances, Inc. v. SEB S.A.*
 - Defendant needs to be **subjectively aware of high probability** of illegal conduct AND then **purposefully contrives** to avoid learning about it (some knowledge + active avoidance)
- **MISTAKE OF FACT**: when can a mistake as to a relevant fact negate the mens rea for an offense?
 - **Moral-wrong**: if underlying act (i.e. taking unmarried girl away from her parents without her consent) is wrong according to community's *moral* standards, then no mens rea is required for age requirement (*Prince*)
 - Age requirement is a *strict liability* element in statutory rape cases in most states (see *Olsen, Garnett* explaining policy of protecting children); the sexual contact forms the core harm, either based on moral or legal wrong theory
 - England repudiates *Prince*, adopts “honest belief” defense (purely subjective standard) in statutory rape (*B (A Minor)*)
 - **Legal-wrong** (Judge Brett's dissent in *Prince*): determining morality is a nebulous concept, mistake of fact is not a defense if underlying conduct is still criminalized, perhaps with a lesser penalty
 - Ex. selling drugs in school zone, no mens rea needed with respect to school zone (*Benniefield*)
 - **MPC 2.04**:
 - (1) Allows mistake of fact defense if:
 - (a) It “negatives [mens rea standard] required to establish material element of offense
 - For a purpose/knowing/reckless crime, belief need only be **honest** (even if unreasonable)
 - For a negligent crime, belief must be **honest AND reasonable**
 - (b) “The law provides that the state of mind established by such ignorance or mistake constitutes a defense” (i.e. self-defense or insanity)
 - (2) Mistake of fact defense is not available if defendant would still be guilty of another crime had the situation been as he supposed (but then mistake reduces grade/degree of offense)
 - **Statutory rape**: allows affirmative defense for honest mistake when age > 10 years old
- **STRICT LIABILITY**: no underlying moral or legal wrong, no mens rea, no defense available; only need to be engaged in the conduct knowingly (but do not need knowledge that conduct is unlawful)
 - Generally used (and upheld) in regulatory, **public-welfare** offenses
 - **Balint** (selling derivatives of opium without requisite order form), **Dotterweich** (shipping pharmaceutical drugs, mixed up labels), **Freed** (possessed unregistered hand grenades)
 - Defendants were all dealing with dangerous items and thus should have been on **notice**
 - Potential for wide-ranging effects on community, shift burden to superior risk-bearer
 - The more regulated the industry, the more likely to allow strict liability

- **Morrisette**: defendant who took casings without knowing they were US property convicted without mens rea, Justice Jackson rejects **Balint**-based argument and lays out federal precedent on how to interpret congressional silence on mens rea (presumption that mens rea requirements are present)
 - (1) **Penalty** provision: public welfare offenses have low penalties and little/no social stigma attached
 - (2) Examine potential for **wide distribution of harm**
 - (3) Must be **rooted in administrative regulatory scheme**, not common law (which require mens rea)
 - (4) Defendant is in **better position** to prevent the harm
- Statute should not criminalize a broad swath of **potentially innocent conduct where defendants have no notice**
 - **Staples**: defendant possessed unregistered firearm that had inadvertently changed to be automatic
 - Conviction overturned: (1) underlying activity (gun ownership) is common and requisite (2) **notice** is missing, (3) penalty (10 years) is very high, (4) backdrop of 2nd Amendment
- MPC 1.04(5) & 2.05: only **violations** (fines, no stigma, minimal penalties) can use strict liability standard
 - Strongly frowned upon in criminal law community: violates basic concepts of penal liability, no evidence that incentives to take higher care actually works
 - Government argues that it does incentivize a greater standard of care, more efficient (puts burden on superior risk-bearer and do not have to prove extra element at trial)
 - **City of Sault Ste. Marie** adopts middle approach: allows defendant to rebut strict liability offense by showing that he was not negligent (took all reasonable care), adopted by Ninth Circuit
- **MISTAKE OF LAW**: only to a few exceptions to maxim that “ignorance of law is no excuse”
 - Arises when one’s statutory interpretation of what conduct is criminalized is wrong (**Marrero**), or one has no idea that a certain type of conduct is criminal
 - (1) **Where knowledge of the law is an element of the offense, and thus defendant’s mistake directly negates a mens rea element of an offense** (cannot be invoked in strict liability offenses, **Marrero**)
 - **Weiss** (kidnapping statute required intent to confine victim “without authority of law,” and since defendants believed that the police had given them permission, conviction overturned)
 - **Smith** (criminal damage act required intent to damage property knowing that it belonged to someone else, so Smith ripping out his own stereo equipment lacked necessary mens rea)
 - (2) **Official reliance on statements of law**
 - Traditional view: “mistake of law is no excuse” even if given by state’s attorney, or other public official; concerns about such advice becoming “paramount to the law” (**Hopkins**)
 - Narrow approach in **Marrero**: only “where an individual relies on the a validity of a law and later, it is determined that there was a *mistake in the law itself*” (not merely a misinterpretation of the statute)
 - NJ’s broad approach: when actor “diligently pursues all means available” and “honestly and in good faith concludes his conduct is not an offense in circumstances in which a law-abiding and prudent person would so also conclude”
 - **MPC 2.04(3)**: limited defense for relying upon official statement of law (later found to be erroneous), contained in a statute, a judicial decision, an administrative order/permission, official interpretation
 - **Entrapment by estoppel**: violates Due Process to convict a defendant for conduct that governmental actors had earlier said was lawful (**Raley**)
 - **Due Process reliance**: protestor relied on Ninth Circuit ruling upholding his prior conduct on First Amendment grounds and protested again before SCOTUS granted certiorari and reversed Ninth Circuit; court held he was entitled to rely on prior Ninth Circuit determination of law (**Albertini**)
 - But see **Rodgers** (SCOTUS): “existence of conflicting cases from other Courts of Appeals...made review of that issue...reasonably foreseeable”
 - (3) **When statute draws a distinction between “knowingly” and “willingly”**
 - **Cheek**: reversed pilot’s conviction for failing to pay taxes because statutory language in tax code (due to its complexity) required a “**willful violation**” to impose liability
 - **Willful**: “**voluntary, intentional violation of a known legal duty**”
 - Only need a good faith subjective belief (even if unreasonable) that one does not owe a legal duty; negates element of knowledge needed to sustain conviction
 - Requisite level of awareness needed to satisfy “**knowingly**” standard
 - **International Minerals** (corrosive liquid transportation), **Ansaldi** (distributing GBL), **Overholt** (disposing of contaminated waste water): **only need to be knowingly aware of one’s conduct, NOT that conduct violates a legal duty**
 - Involves potential for “dispersed harm,” public-welfare focused, fairly sophisticated actors engaging in conduct that mandates notice of legal duties owed to public
 - **Liparota** (food stamp fraud): like **Cheek**, need knowledge of a known legal duty and that one’s conduct violates that duty

- No potential for wide public harm, worry about criminalizing broad swath of innocent conduct, fairly unsophisticated actors (i.e. individuals)
- (4) **Constitutional Due Process-based exception**: weak argument, only successfully used in *Lambert*
 - Struck down LA ordinance requiring convicted felons to register when coming to LA (powerful law enforcement tool) because: (1) does not put people on notice, (2) a *malum prohibitum* crime with no moral implications, (3) a purely *passive* omission (not an active one, so broad swath of regulatory/strict liability crimes can stand), (4) an unsophisticated actor
 - Rationale behind law is to give police a strong bargaining tool, not protect public (*Balint*)
 - If law is about public safety (sex offender law in *Bryant*), courts ignore *Lambert*
 - Largely discarded case for fear that it will require knowledge of a legal duty in every case and thus invalidate all strict liability legislation
 - Omission by government official to tell defendant about legal duty not a violation of Due Process (*Wilson*); but see *Leavitt* (reached opposite result in similar domestic dispute facts)
 - Stronger public policy about safety, idea of “general notice” that one cannot own guns
- Cultural defense widely rejected as mistake of law defense; onus on people to inform themselves of the law

HOMICIDE

- Actus reus is same (death of someone); entirely law of mens rea
- **INTENTIONAL KILLINGS: MURDER & MANSLAUGHTER**
 - **PREMEDIATION/DELIBERATION**: draws line between first-degree and second-degree murder
 - Statutory distinction between murders that are “**premeditated, willful, and deliberate**” and those that are not
 - *Carroll*: “**no time is too short**” to find premeditation, no planning required
 - Only need a “conscious purpose to bring about death”
 - Therefore, *all intentional killings are first-degree murders*
 - *Guthrie*: must be “some evidence that defendant **reflected and weighed** his decision to kill” taken in light of circumstances of situation
 - Mere intent to kill is not enough – need *intent plus premeditation* (i.e. planning)
 - *Anderson* factors: (1) “planning” activity beforehand, (2) motive, defendant’s prior relationship with victim, (3) preconceived design
 - MPC does not use premeditation as basis for first-degree versus second-degree (i.e. mercy killing example)
 - 210.2: [except for EED] criminal homicide is murder when committed “purposely or knowingly”
 - **PROVOCATION**: intentional killings with extenuating circumstances that mitigate culpability from murder to manslaughter
 - **COMMON LAW**
 - **Traditional (*Girouard*): “words alone are not adequate provocation”**
 - Wife called him “a lousy fuck,” stabbed her 19 times
 - Need words + “conduct indicating a present intention/ability to cause defendant bodily harm”
 - Refuse to expand traditional common law provocation categories: (1) discovering adultery, (2) mutual combat, (3) serious assaults/battery short of allowing self-defense justification, (4) resistance of a legal arrest, (5) injury to defendant’s relative
 - Shift other provocations to second-degree murder (would be manslaughter in *Maher*)
 - **Expanded (*Maher*):** reason for killing should be “disturbed or obscured by passion to an extent which might **render ordinary men, of fair average disposition [REASONABLE PERSON]**, liable to act rashly or **without due deliberation or reflection**, and from passion, rather than judgment”
 - Man’s wife was having sex in woods with other man, Maher shoots lover in saloon
 - Abandons strict common law categories, adopt case-by-case approach
 - **REASONABLE PERSON standard**: physical attributes are taken into account, but emotional states or mental illnesses short of legal insanity are not
 - Growing willingness to use some emotional states (i.e. battered person standard) if provocation is directly tied to that
 - **LIMITS ON PROVOCATION**
 - Provocation as partial justification or partial excuse in *Maher* jurisdictions
 - Justification: category is limited, implication that victim is partially responsible because the victim knows about the defendant’s situation
 - Excuse: category is broader, no implication of victim’s knowledge, only take into account defendant’s situation
 - “**Cooling off**” period: lapse of time between provocation and killing renders defense inadequate as a matter of law (must be in “hot blood”), unwilling to allow “rekindling”

- Defendants who elicit provocation generally cannot invoke the defense
- **MPC 210.3(1)(b): EXTREME EMOTIONAL DISTRESS**
 - Defendant has an extreme mental or emotional disturbance [SUBJECTIVE] + there must be a reasonable explanation or excuse, which shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be [OBJECTIVE]
 - Take into account physical characteristics, extreme grief, shock, but not idiosyncratic moral/cultural values or mental illness (MPC is about letting things in that lessen culpability)
 - *Cassasa*: merely breaking up with defendant wasn't reasonable
 - "Cooling off" period, "rekindling," "latent, long brooding period" all allowed (don't need "hot blood")
- **UNINTENTIONAL KILLINGS**
 - **(1) KILLINGS COMMITTED RECKLESSLY/NEGLIGENTLY**
 - **CL: INVOLUNTARY MANSLAUGHTER**
 - Three possible standards: recklessness, criminal negligence, or civil negligence
 - *Welansky* imposed heightened **criminal negligence** standard: convicted night club owner of involuntary manslaughter for "wanton and reckless [intentional] conduct where there is **a duty to act** and involves a **high degree of likelihood that substantial harm** will result"
 - Many jurisdictions use civil negligence standard because harm is so great
 - **MPC**: divides into two separate offenses
 - **MANSLAUGHTER (210.3)**: committed *recklessly* (with subjective awareness of risk)
 - (1) Conduct created a substantial and unjustifiable risk of death (need not be over 50%)
 - The lower social utility, the lower the risk has to be (i.e.. Russian Roulette)
 - (2) Creation of such a risk was unjustified (does it serve any social purpose?)
 - (3) Taking of risk was unjustified (most courts use objective standard here) and constituted a "gross deviation" from standard of care
 - (4) Defendant consciously disregarded risk (subjective element)
 - *Hall*: upheld manslaughter conviction of ski instructor skiing super fast, killing skier
 - **NEGLIGENT HOMICIDE (210.4)**: committed *negligently* (without awareness of risk); uses heightened criminal negligence standard ("gross deviation" from standard of care)
 - *Williams*: upheld conviction for parents who did not take baby to doctor (omission) and died
 - Excluded evidence of culture (Indian, fear of social services), education, age
 - MPC generally takes same approach here as it does with provocation: "reasonable person *in the actor's situation*" (physical characteristics, illness, shock, but not idiosyncratic moral values or mental illnesses)
 - **(2) DEPRAVED HEART MURDER**: a truly *pointless* activity, extremely dangerous and results in someone's death
 - Russian Roulette, throwing boulder off overpass, flinging bomb into crowd, beating someone to death
 - Since social utility is non-existent, risk does not have to be that substantial
 - **COMMON LAW**: an act of "gross recklessness" where death will reasonably result, thus showing that "wickedness of disposition, hardness of heart, cruelty" (*Mallone*, involving Russian Roulette)
 - Charged as second-degree murder
 - **MPC 210.2(b)**: when homicide is committed "recklessly under circumstances manifesting **extreme indifference to the value of human life**" (subjectively aware of risk and simply does not care)
 - Charged as murder
 - 2.08(2): Recklessness need not be shown if the defendant was unaware of the risk because of voluntary intoxication (*Fleming*, upholding depraved heart murder charges for reckless driving)
 - Generally courts use objective standard in determining what is "extreme indifference": a huge degree of divergence from norm of acceptable behavior (Souter)
 - **(3) FELONY MURDER**
 - **COMMON LAW**: imposes *strict liability* for killings that result from commission of a felony
 - Charged as second-degree murder
 - **MUST BE ACTING "IN FURTHERANCE OF THE FELONY"**
 - Factors: time intervals, physical distance from crime scene, escape cases, killing lookout
 - *Gillis*: fatal accident while escaping held liable because he was *fleeing from burglary*
 - If acts are not "reasonably foreseeable in furtherance of a common objective" co-felons are not liable under expanded *Luparello* theory for accomplice liability
 - Co-felons liable for leader killing lookout because it helped ensure robbery (*Cabaltero*)
 - Lethal acts by third-parties (police, victims) resisting the felony
 - **AGENCY**: *only if the act of killing is done by a co-felon or someone acting in concert with a co-felon will the felony murder rule apply* [majority]

- Limits liability by not imposing liability for killings by cops, victims
- Adopted in *Canola*, where jewelry store owner killed robber (statutes said “ensues”)
- Some states resort to depraved heart/implied murder if killing by a non-felon occurs during a particularly dangerous felony (evincing conscious disregard for life)
 - **PROXIMATE CAUSE: *whether the killing (regardless of who did it) is within the foreseeable risk in committing the felony [minority]***
 - Much broader scope of liability
 - “Justifiable homicide” exceptions in statutes for when co-felons are killed by cops/victims
 - Cannot hold other co-felons liable because cop/victim was justified (with self-defense) in killing felon, so no murder was actually committed (*Redline*)
 - Lives of co-felons are not the purpose of the felony murder statutes (Posner disagrees, since their lives are not “completely worthless” and could still affect deterrence)
- **MPC 210.2(b)**
 - Establishes a rebuttable presumption that presumes indifference to human life if killing is committed during a robbery, rape, deviate sexual intercourse by force, arson, burglary, kidnapping, or felonious escape
 - Defendant can then rebut with evidence (“said no guns, but X brought one anyway”)
- **TYPES OF FELONIES INCLUDED**
 - *Serne*: limits felony murder doctrine to inherently dangerous felonies, “**likely in itself to cause death**”
 - MPC 210.2(b): a robbery, rape, deviate sexual intercourse by force, arson, burglary, kidnapping or felonious escape
 - Other jurisdictions just include all felonies unless legislature specifies otherwise
- **CAUSATION FOR FELONY MURDER**
 - **Stamp**: only need but for causation, not proximate cause (death need not be “reasonably foreseeable”)
 - Directness test, “robber takes victim as he finds him” (died of a heart attack after robbery)
 - “Felon held is held **strictly liable** for all killings committed by him and his accomplices committed during the course of the felony”
 - Most other jurisdictions: require both factual and proximate cause
 - **King**: no felony murder for plane crash while carrying marijuana because no proximate cause (crash was not a foreseeable result of felony because it was not made more likely by the fact that the plane was carrying contraband)
 - Could have been if plane had been flying lower to avoid detection
- **MISDEMEANOR-MANSLAUGHTER RULE** (unlawful-act doctrine): a misdemeanor resulting in death can result in an involuntary manslaughter conviction without proof of recklessness or negligence
 - Limit harshness by requiring proximate cause, only *malum in se* crimes, or to crimes with high danger

CAUSATION

- Must be proven when crime contains a “result” element; need both FACTUAL and PROXIMATE cause
- **FACTUAL CAUSATION** (predicate to liability)
 - Almost never a problem: so long as defendant’s conduct increased the risk of death *beyond a reasonable doubt*, then but for causation is present and case goes to the jury
 - **Omission** cases: need to prove beyond a reasonable doubt that person would have survived *BUT FOR* defendant’s omission, timing of when legal duty kicks in especially important (*Muro*)
- **PROXIMATE CAUSE**
 - *Acosta*: harm must be foreseeable; excluding “extraordinary results,” helicopter crash was a “possible consequence which reasonably might have been contemplated”
 - *Arzon* (two fires) & *Kibbe* (victim left in cold to die, hit by truck): “sufficiently direct cause” standard
 - “*So long as ultimate harm is something which should have been foreseen as being REASONABLY RELATED to the acts of the defendant*”
 - Two actions must be linked together and interact to produce the death (i.e. make victim more *VULNERABLE* to being trapped by fire since exits were blocked or being hit by truck since he was naked by side of road at night)
 - Defendant’s conduct need not be sole and exclusive factor in death (two fires case)
 - *Warner-Lambert’s* specific-causal mechanism: required defendant industry to foresee the specific, triggering cause of the explosion at gum factory; later limited by NY to commercial or manufacturing settings only

- **MPC 2.03 on proximate cause for purpose/knowledge**: actor is liable for result of his conduct if it involves *the same kind of harm he intended or risked*, so long as it is “*not too remote or accidental*” in its occurrence to have a [just] bearing on the actor’s liability”
 - **If a reckless/negligent crime**: *the same kind of injury or harm as the probable result*
- Doctrine of **transferred intent**/MPC 2.03(2): A intends to kill B, misses and kills C; all jurisdictions establish proximate cause for killing C because A’s intent to kill B is “transferred” to his action that killed C
- **INTERVENING/SUBSEQUENT HUMAN ACTIONS**
 - Actions that, even if foreseeable, can break the causal chain
 - Only applies to subsequent actions, NOT preexisting conditions (i.e. cirrhosis, religious beliefs)
 - One takes victim as one finds him
 - Medical malpractice is *always* foreseeable (*Shabazz*)
 - **ACTIONS INTENDED TO PRODUCE THE RESULT**
 - When intervening actor makes a **knowing, voluntary, intentional** choice to do something, it displaces defendant’s prior conduct and breaks causal chain
 - Handing someone means to commit suicide is not murder because person then makes free, informed decision to kill themselves (*Campbell, Kevorkian*)
 - Contra *Stephenson*, where rape victim was in complete control of Grand Dragon when she took the poison, torture “addled her mind” and rendered her choice not free and voluntary
 - *Roberts*: man put poison in reach of wife, who killed herself; sustained murder conviction because wife was completely dependent on him, vulnerable
 - **Involuntary choices** by the subsequent actor do not break causal chain
 - *Kern*: man’s choice to run across highway (and then being hit by car) fleeing from teenagers was not voluntary
 - *Matos*: officer’s risky pursuit across rooftops of armed robbery suspect resulting in falling down air shaft was “in the performance of his duty” and thus not voluntary
 - **ACTIONS THAT RECKLESSLY RISK THE RESULT**
 - Less likely to break causal chain
 - Two drag racing cases show jurisdictional split:
 - *Root*: adopts **direct causal** connection standard, respects autonomous decisions
 - Deceased voluntarily and freely decided to drag race; constitutes intervening human conduct that does break causal chain and cancels defendant’s liability
 - Defendant’s conduct (i.e. suggesting drag race), though the but-for cause of death and highly foreseeable that someone will die, is not “sufficiently direct cause”
 - *McFadden*: more expansive view of proximate cause that keeps chain of liability intact
 - Utilitarian reasons of wanting to deter drag racing, sacrifices autonomy
 - *Atencio*: upholding involuntary manslaughter conviction for survivors of Russian Roulette game, differ from drag racing (pure luck), a duty not to engage in the conduct/encourage decedent to play
 - Courts tend to ignore this doctrine in drug cases – if A gives B cocaine, and then B overdoses, A (drug supplier) can be held liable for foreseeable, though freely chosen, acts of purchaser

RAPE

● ACTUS REUS

- Vast majority require both **the defendant’s force** AND **the victim’s nonconsent** before sex becomes rape
 - Victim’s **resistance** is often read into statutes: “to the utmost” (only LA), “earnest,” (a few), “reasonable resistance” (about half the states), remainder states view resistance as highly probative of consent
- (1) **FORCE AND RESISTANCE**
 - Majority of states retain force/threat of force as a statutory element of rape (*Rusk*: choking, pulling on bed)
 - Even if consent is not present, physical force still must be present (implicit threats not enough, *Alston*)
 - Interpreted to mean **physical force**
 - *DiPetrillo*: employer standing over employee sitting on chair was only a “mere modicum” of physical force, did not suffice under statute, power dynamic/psychological pressure inherent in employment relationship did not count as force)
 - Contra *Burke*, where rape charge sustained against policeman because he had “present ability to execute threats” due to position of authority
 - Situations with psychological pressure due to power differential (principal/student, foster child/parent) cannot establish physical force requirement (*Thompson, Mlinarich*)
- (2) **LACK OF CONSENT**
 - Generally established through proof of **resistance** or by proof that victim **failed to resist because of fear**

- Whether victim's fear in face of a threat was "reasonable" is judged by an objective standard (*Rusk*)
 - Exception if defendant knew of victim's unreasonable fear and took advantage of it (*Iniguez*)
 - Spectrum from verbal resistance plus behavior indicating unwillingness to anything short of verbal permission
 - Definition of rape as a crime of violence or as a crime against sexual autonomy
 - Defective consent
 - Statutory rape (below a certain age)
 - Unconsciousness
 - Incapacity (drugs and alcohol)
 - Many states do not impose liability if *someone other than defendant* drugged victim
 - MPC 213.1 is especially restrictive: (b) "Substantially impaired her power...by administering or employing without her knowledge drugs...for the purpose of preventing resistance"
 - Or if victim voluntarily becomes intoxicated (2/3 of states)
 - Minority approach focuses on victim's power of judgment, not power of resistance (*Giardino*)
 - **DECEPTION**
 - Traditionally not a grounds for invalidating consent so long as no fraud in the factum (person knows act is sex, *Evans, Boro*)
 - If fraud in the inducement (lies, flattery), however, then can obtain conviction
 - Cannot obtain conviction on general fraud because sex is not property or money
 - Note: proposed revision of MPC incorporates blackmail provisions in "sexual intercourse by exploitation"
 - One cannot pretend to be a medical professional (*Boro*), or use positions of authority (teacher, coach, school counselor, foster parent)
 - Very narrow restrictions to avoid problematic, "parade of horrors" situations
- **MENS REA**
 - (1) **FORCE**
 - "Knowing" standard: need to look at defendant's perspective (*Evans*, psychologist in NY)
 - Due to centrality of mens rea to rape law
 - Government can use this high standard to argue for lower consent standard
 - (2) **LACK OF CONSENT**
 - Proof of resistance (either physical or verbal) is highly dispositive
 - **MINORITY**: if statute requires only consent (has eliminated force requirement, as in *MTS* where force is act of sex itself)
 - Consent is doing all the work in identifying morally culpable actors, and courts will impose a higher mens rea standard
 - *Reynolds* in Alaska: no force requirement, but recklessness standard for nonconsent
 - **MAJORITY**: If not (majority require force and nonconsent), then courts adopt lower NEGLIGENCE standard
 - *Sherry*: court rejects knowledge standard urged by defendants and adopts a negligence standard that allows mistake of fact only when "honest and [objectively] reasonable"
 - Government argues for negligence: bright-line rule, pockets of strict liability, deterrence
 - MA & PA: adopt strict liability on consent issue, since mens rea is quite high in force requirement

BLACKMAIL

- Involves two perfectly legal acts (a threat + demand for property/money) that combined together are criminal
 - To encourage people to use legal channels to report crimes, inefficiency argument
 - NOTE: does not extend to threats to destroy one's *own* property (Tobi the bunny)
- **COMMON LAW**: core of blackmail was threatening to expose people's crimes, expanded to revelation of secrets
 - *Harrington*: very broad statute said "maliciously threatens [baseline recklessness: subjective awareness that someone's statement will be construed as a threat] to accuse another of a crime or offense, or with an injury to his person or property, with intent to extort money...OR with intent to compel the person so threatened to do an act against his will [includes any act, like sex, not limited to property]"
 - Lawyer needed to divorce the threat of the adulterous pictures from the demand for a divorce settlement
 - *Fichtner*: even if one honestly believes that property is his (shoplifting context), cannot demand it back threatening to report crime to police; want to encourage people to use official channels [MAJORITY]
- **MPC 223.4**: limited to obtaining property (excludes sex) by threatening to:
 - (1) Inflict bodily injury or commit any other criminal offense
 - (2) Accuse anyone of a criminal offense
 - (3) Expose any secret subjecting someone to hatred, contempt, ridicule, or impair business repute

- (4) Take or withhold action as an official, or cause an official to do so
- (5) Bring about or continue a strike, boycott, or other collective unofficial action if not done in interest of group
- (6) Testify or provide/withhold information with respect to another's legal claim or defense
- (7) Inflict any other harm which **would not benefit the actor**
 - Quitting a job can benefit actor, but merely getting psychic benefit does not (could swallow up blackmail)
- Affirmative defense to (2), (3), and (4) if property was honestly claimed as restitution or indemnification for harm done

ATTEMPTS

- Punishment treated *exactly* the same as the underlying crime (MPC exempts capital and "other serious felonies")
- **MENS REA**
 - **CONDUCT**: to **PURPOSELY** engage in that conduct (MPC 5.01(1)(a))
 - **RESULT**: the **SPECIFIC INTENT** (purpose) to kill to sustain attempted murder conviction
 - MPC 5.01(1)(b): broadened to "purpose" OR "belief/knowledge"
 - Even though some lower mens rea (recklessness or negligence) could suffice for conviction of completed crime
 - I.e. cannot be convicted of attempted depraved heart murder or felony murder
 - **Smallwood**: cannot convict of attempted murder for raping without a condom and spreading HIV absent some other conduct to infer that specific intent to kill
 - **Raines**: firing pistol into driver's side window [loaded gun cases] always present permissible inference that specific intent to kill was present ("natural and probable consequences" inference, can differ from HIV where risk of infection is much lower)
 - **Hinkhouse**: expressed intent to infect with HIV, actively concealed HIV status, lied to sexual partners
 - Few outliers (CO, FL, WY) allow convictions for attempted murder based on recklessness
 - **ATTENDANT CIRCUMSTANCES**: same as that of the **UNDERLYING CRIME**
 - I.e. no mens rea necessary (strict liability) with respect to age in attempted statutory rape
- **ACTUS REUS**: how far along the path does the defendant need to be?
 - (1) **MPC 5.01(2) SUBSTANTIAL STEP** [majority]: act must constitute a "**substantial step**" in a course of conduct and be "**strongly corroborative**" of the actor's criminal purpose
 - Conduct that will NOT be held insufficient as a matter of law (goes to jury, try to fit it under here):
 - Lying in wait, searching for or following contemplated victim
 - Enticing or seeking to entice contemplated victim to go to intended place of the crime
 - Reconnoitering the place contemplated for scene of the crime
 - Unlawful entry of a structure, vehicle, or enclosure contemplated for commission of crime
 - Possession of materials to be employed in commission of crime, which are specially designed for such unlawful use or which *can serve no lawful purpose* of the actor under the circumstances
 - Possession, collection, or fabrication of materials to be employed during crime, at or near the place contemplated, where such possession serves no lawful purpose of the actor under the circumstances
 - Soliciting an innocent agent to engage in conduct constituting an element of the crime
 - (2) **DANGEROUS PROXIMITY**: "must be **so near** to its accomplishment that **in all reasonable probability** the crime itself would have been committed but for timely interference"
 - Physical proximity matters: cannot go looking for intended victim in CA (when she's in NY) and be held liable even if one has the subjective intent to kill her
 - **Rizzo**: defendants had not yet found victim to rob, not "dangerously proximate"
 - **Harper**: "bill trap" and possession of surgical gloves, gun not "dangerously proximate" since victim was at least ninety minutes away
 - (3) **RES IPSA/EQUIVOCALITY**: "act must **in itself** be sufficient evidence of the criminal intent with which it is done" (**Barker**)
 - To pass this test, must come up with an alternative, innocent reason for the action
 - Didn't work in **McQuirter** because of racial bias of the time
 - Not widely adopted in US, restricts law enforcement too much
 - (4) **LAST STEP**: "must have taken the **last step** which he was able to take along the road of his criminal intent" (**Eagleton**)
 - Widely rejected, requires police to wait until defendant fires gun
 - **RENUNCIATION** as a defense for attempt
 - Traditional view: once attempt is undertaken, cannot erase liability/no defense
 - To minimize unfairness, courts placed threshold very close to last act (police problems arose)
 - Modern view: place threshold of criminality earlier in the process, but allow renunciation as affirmative defense

- MPC 5.01(4): defendant abandoned his effort to commit the crime “under circumstances manifesting a complete and voluntary renunciation of his criminal purpose”
 - Not voluntary if motivated by new circumstances which increase probability of being caught, the difficulty of committing the crime, or postponing crime or changing plan or victim
- *Joyce*: preliminary discussion for purchase of cocaine broke down, cannot subsequently charge with attempt to purchase cocaine

ACCOMPLICE LIABILITY

• MENS REA

- **CONDUCT: PURPOSE [SPECIFIC INTENT]** to facilitate the underlying conduct
 - *Hicks*: needed to prove that Hicks intended to aid/encourage Rowe to shoot Colvard, not that they merely ended up having that effect
 - *Gladstone*: defendant directs undercover informant who wants to buy marijuana to Kent with a map, who then sells Thompson the marijuana; cannot convict Gladstone of aiding/abetting Kent’s sale to Thompson because *mere knowledge* is not the same as *intent to facilitate the sale itself*, need knowledge *plus* to infer intent
 - *Peoni* [Hand]: “a defendant in some sort [must] associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed”
 - Later cases (*Wilson, McKeown*) upheld liability because defendant was present at sale, certified quality
 - **MINORITY: KNOWLEDGE** is enough for “serious crimes” but still need purpose for minor ones (*Fountain*)
 - Knowledge enough to *infer* purpose (i.e. repeat transactions, discount, knowledge of illegal activity)
 - *Russell*: defendants can be opposed to one another (mutual gunfight) but still have “shared purpose in overall venture of the gunfight” and thus be liable under accomplice liability for depraved heart murder
- **RESULT: SAME AS THE SUBSTANTIVE OFFENSE**
 - *McVay*: aiding/abetting involuntary manslaughter on steamer because principal only had to be negligent
 - *Roebuck*: culpability equated for principal and accomplice [MPC same as common law]
 - **MINORITY**: one can never aid an unintentional crime
- **ATTENDANT CIRCUMSTANCES**: no clear answer, depends on what “work” the element is doing in the statute
 - If purely utilitarian/strict liability, hold accomplice to same standard as principal (no mens rea)
 - But if it requires some knowledge, argue that accomplice needs higher mens rea due to notions of culpability
 - *Harris*: age requirement in statutory rape where principal would be held strictly liable, accomplice needs same informational elements to be held to same mens rea (chance to see and judge age) as principal, utilitarian view
 - Contra *Bowman*: accomplice needs knowledge of the child’s age (more culpability-based view)
- **ADDITIONAL CRIMES COMMITTED**: by principal in course of crime, but not by accomplice
 - **MAJORITY/MPC**: accomplice did not *intend* to facilitate the underlying conduct, so no liability
 - **MINORITY: NATURAL AND PROBABLE CONSEQUENCES THEORY (LUPARELLO)**
 - **Accomplice is liable for crimes beyond those that he intentionally facilitated so long as they are “reasonably foreseeable” as a result of the first crime** (essentially a negligence standard) (*Luparello*)
 - Subsequent crime does NOT have to be “in furtherance” of the original crime
 - Killing man that accomplice wanted to extract information from did not help objective
 - Some jurisdictions have narrowed it to liability for the “*natural and probable*” results of a crime
 - *Roy*: a robbery occurring during an illegal handgun sale is not natural nor probable
- **ACTUS REUS**: a minimal act of aid/encouragement (bystander is not sufficient)
 - **COMMON LAW**: needed to *actually* aid or encourage the principal in order to be liable
 - *Tally*: the telegraph needed to be actually sent and received by operator who then blocked other telegram
 - **MPC 2.06(3)**: mere *intent* to aid or encourage suffices to establish liability
 - No but-for causation between defendant’s action and crime committed is needed (*Wilcox v. Jeffrey, Tally*)
- **RELATIONSHIP BETWEEN PARTIES**
 - **COMMON LAW**: if principal did not have requisite mens rea to commit underlying offense (feigned), then accomplice cannot be convicted of underlying crime (*Hayes*, Hill lacked intent to commit felony when breaking into store)
 - Derivative notion of accomplice liability: predicated on a crime being committed by principal
 - If initial crime is *justified* and principal is acquitted (i.e. self-defense), then no crime was committed
 - Does *not* apply to excuse (limited to acts of principal) or policy reasons (diplomatic reasons)
 - **MPC 5.01(c)(3)**: circumvents common law by allowing accomplice to be convicted of substantive crime when the circumstances are “as he believes them to be”
 - Can convict accomplice regardless of whether principal can be or not (focuses on subjective mens rea)

- **Vaden:** affirmed conviction for illegal game hunting even though Snell was undercover officer when he shot fox
 - Snell shielded due to public officer exception, but one particular to him
- **ENTRAPMENT:** defense when feigned government accomplice induced a defendant who is not “predisposed” to commit the offense to do so (very difficult defense to mount)
- **INNOCENT AGENT DOCTRINE (MPC 2.06(2)):** when person, “acting with the kind of culpability that is sufficient for the commission of the offense, causes an innocent or irresponsible person to engage in such conduct”
 - MPC 2.06(6)(a-b): cannot be accomplice if one is a victim or the offense is so defined such that his conduct is inevitably incident to its commission (bigamy, prostitution, bribery)
- **SEVERITY OF OFFENSES:** convicting accomplice of higher crime than principal
 - **Regina v. Richards:** woman who hired men to beat up husband can only be convicted of as high an offense as the principals were (in this case, misdemeanor assault); limited by their mens rea
 - Compare with **McCoy:** Lakey convicted of aiding murder even though principal had imperfect self-defense which mitigated down to voluntary manslaughter; focused on subjective mens rea
 - Presumption that perfect self-defense would not be particular to principal

CONSPIRACY

- Does not “merge” into completed offense (like accomplice liability does)
- **ACTUS REUS:** an agreement between two or more people to commit a crime
 - **MAJORITY:** requires an overt act in addition to agreement
 - A minor act that, standing alone, would be entirely equivocal (telephone call in **Bertling**)
 - MPC dispenses with overt act for first and second-degree felonies
 - Rarely is there express evidence of an agreement, have to *infer* it
 - “A conspiracy may exist if there is no communication and no *express* agreement, provided that there is a tacit agreement reached without communication” (**Interstate Circuit**)
 - Way to disprove conspiracy is to offer an alternate, innocent explanation for parallel conduct
 - Courts are fairly liberal in inferring agreement (**Garcia**, gang membership is not enough for agreement)
- **MENS REA:**
 - **CONDUCT:** need **SPECIFIC INTENT** to engage in underlying conduct (knowledge does NOT suffice)
 - Cannot conspire to commit an unintentional crime
 - **Lauria:** factors to infer intent [in addition to knowledge] that establish **special interest** in criminal enterprise
 - (1) When person has a **stake in the venture**
 - Charging higher rates or selling in bulk/giving discounts
 - (2) When goods have **no legitimate purpose**
 - Unlike **Falcone** (sellers of sugar, yeast indicted for moonshining conspiracy)
 - (3) When volume of business is **grossly disproportional** to any legitimate demand, or constitutes a high proportion of seller’s total business
 - Like **Direct Sales** (drug wholesaler selling high volumes to physician in rural town who was distributing them to addicts)
 - Knowledge is NOT enough to infer intent for misdemeanors; left open for felonies (majority of jurisdictions still require intent, however)
 - **RESULT:** must be **CONSCIOUS OBJECT** to cause result or it is **PRACTICALLY CERTAIN TO RESULT**
 - **ATTENDANT CIRCUMSTANCES:** unclear whether intent is necessary or knowledge is enough (same analysis as attempt); what “work” is the element doing?
 - **Freed:** upheld conspiracy to possess unregistered hand grenades (even though defendant didn’t know they were unregistered), held registration element to be a strict liability element (similar to statutory rape)
 - **ACCESSORIAL LIABILITY: PINKERTON**
 - **MINORITY:** one can be liable for substantive crimes of co-conspirators that are *not within the scope of the conspiracy* so long as the crimes are (1) **in furtherance of the conspiracy**, and (2) **reasonably foreseeable**
 - Essentially creating a large pocket of negligence liability in conspiracy (like **Luparello** for complicity)
 - **Alvarez:** limits **Pinkerton** to non-“minor” players who had actual knowledge of the situation
 - **MAJORITY [MPC]:** rejects **Pinkerton**, imposes accomplice liability on conspirators for substantive crimes of co-conspirators only when the strict conditions for accomplice liability are met
 - **DURATION AND SCOPE**
 - A conspiracy remains in effect until its objective have either been achieved or abandoned (a continuing offense)
 - Statute of limitations begins to run when the conspiracy terminates (not when it’s formed)
 - Need a separate conspiracy for the “cover-up” of a crime (**Grunewald**)

- **RENUNCIATION & WITHDRAWAL**
 - **COMMON LAW:** cannot withdraw once agreement is made
 - **MPC 5.03(6):** an affirmative (complete) defense if actor thwarts the success of the conspiracy manifesting a complete and voluntary renunciation of his criminal purpose
 - (7): Abandons the conspiracy only if he advises his co-conspirators that he is leaving OR if he informs the police of the conspiracy (but not a defense to conspiracy charge itself, only to subsequent acts)
- **SENTENCING**
 - **COMMON LAW:** consecutive sentences for both conspiracy and substantive crime
 - **MPC 1.07(b):** does not allow separate punishments if one offense is only a conspiracy to commit the other
 - But does allow cumulative sentences if it's just a broad conspiracy to commit lots of crimes

CORPORATE CRIMINAL LIABILITY

• LIABILITY OF THE CORPORATE ENTITY

- **RESPONDEAT SUPERIOR:** a corporation is liable for the acts of an actor if the actor is:
 - (1) Acting within the scope of employment
 - (2) With the intent to benefit the company
 - Do not need *actual* benefit (can even harm) so long as subjective intent is present (*Sun-Diamond Growers of California*)
 - Very expansive standard of liability adopted by federal system, but hemmed in by prosecutorial discretion
 - Solves evidentiary problem of trying to hold individuals accountable for acts of company
 - *Hilton Hotels Corp.*: “a corporation is liable for the acts of its agents within the scope of their authority *even when done against company orders or contrary to general corporate policy*,” employee acted “contrary to express instructions” not to boycott suppliers who would not donate to campaign
 - Some states (MA) restrict scope to liability for acts of agents “in a position where he has enough authority and responsibility to act for...the corporation in handling the *particular* corporate business...he was engaged in at the time he committed the criminal act” (*Beneficial Finance Co.*)
- **MPC 2.07(1):**
 - (a) Respondeat superior liability sufficient for minor violations/fines
 - (b) Silent as to who is needed to incur corporate liability for omissions of duties imposed by law
 - (c) “True crimes”: “the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment”
 - “Whose acquiescence to the wrongdoing – by virtue of his position of authority – may fairly be regarded as *reflecting corporate policy*”
 - Minority approach, evidentiary problems (who is a “high managerial agent?”)
 - *Community Alternatives Missouri, Inc.* held that lead staff person at one (of many branches) nursing home was a “high managerial agent” (broad definition of MPC term)

• HOW AND WHY TO PUNISH A CORPORATION

- Fines, but need to be greater than any potential gain multiplied by probability of detection to have any deterrence
- Probation (*Guidant, LLC*)
- Deferred prosecution agreements (DPA)/no prosecution agreements (NPA): change corporate governance, abandon certain business practices (even if legal), implement new compliance programs, install a monitor to supervise
 - Market reacts to criminal charge by plummeting share price of company stock
 - Possible loss of government contracts
 - Harms innocent shareholders, could “kill” company (Arthur Andersen)

• OFFICER LIABILITY FOR CORPORATE ACTION

- **RESPONSIBLE CORPORATE OFFICER DOCTRINE:** liable “by reason of position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct” the harm done and did not do so
 - An element of causation: if no “reasonable relationship” to situation and thus no way to prevent it, then no liability can attach
 - Law does not impose that which is “objectively impossible”
- **MENS REA:** officer needs requisite mens rea as specified under the operative statute
 - *Gordon*: business partners’ conviction overturned for violating Defense Production Act by selling sewing machines on unauthorized credit terms because statute contained “willfully”
 - Cannot impute the knowledge or intent of employees to defendants since mens rea is present
 - *MacDonald & Watson Waste Oil Co.*: conviction overturned because jury not instructed that president needed requisite “knowledge” as specified in statute

- Compare with *Park*: CEO held liable for rodent issue under strict liability regulatory offense with no mens rea requirement
 - So long as he had a “reasonable relation” to situation, liable (as in *Dotterweich*)

JUSTIFICATIONS: a complete shield from all criminal liability, defendant did nothing wrong

- **SELF DEFENSE:** based on necessity
 - ELEMENTS: (1) threat of the use of deadly force, (2) threat was unlawful and imminent, (3) defender believes that he is in peril of death or serious bodily harm, (4) defender’s belief must be objectively reasonable (*Peterson*)
 - **COMMON LAW [MAJORITY]**
 - (1) A can use non-deadly force against B if A reasonably believes that it is necessary to protect oneself against imminent, unlawful use of force of B
 - (2) A can use deadly force against B if A reasonably believes that it is necessary to protect oneself against imminent, deadly force of B
 - **DEADLY FORCE:** likely or reasonably expected to cause death or serious bodily injury
 - (1) A has to **HONESTLY [SUBJECTIVE]** believe it is necessary
 - Evidence of BWS overwhelmingly admitted to prove this prong (*Kelly*, scissors)
 - (2) A “**REASONABLE PERSON**” [OBJECTIVE] in A’s position would believe it was necessary as well (*Goetz*)
 - Physical attributes, knowledge that A has about B (if he’s a former Navy SEAL), but NOT subjective mental states or idiosyncratic moral beliefs
 - Evidence about previous mugging experience included (*Carillo*)
 - BWS generally NOT included in standard (not a “reasonable battered person”)
 - But see *Leidholm*, instructing that juries should “assume the physical *and* psychological properties peculiar to the accused”
 - PTSD, “Holocaust Syndrome” (*Werner*) excluded as well
 - **IMMINENCE:** deadly force being exerted against A must be occurring at exact moment of danger
 - Inevitable harm is NOT imminent harm (*Schroeder* (cellmates), *Ha* (warrior culture))
 - But see *Robinson*: “where torture appears interminable and escape impossible” killing the batterer may be reasonable to an ordinary person
 - *Norman*: battered wife killed husband in sleep, threat was not imminent, convicted of murder
 - Imminence does not mean that victim exhausted all other options
 - **IMPERFECT SELF-DEFENSE:** if A honestly believed deadly force was necessary, but a reasonable person would not
 - Reduces charge from murder to voluntary manslaughter
 - **MPC 3.04 [MINORITY]:** A can use deadly force against B if A believes and a “reasonable person in the circumstances” would believe that such force is immediately necessary to protect A against death, serious bodily harm, kidnapping or forcible rape
 - Slight loosening of objective standard – “in the circumstances”
 - **DEADLY FORCE** 3.11(2): requires a “substantial risk” of death or serious bodily injury; the defendant must use it with the intent to inflict such death or injury (not just a threat) [SUBJECTIVE]
 - **If belief is honest but unreasonable, and A shoots and misses → because A has that imperfect self-defense shield, cannot be liable for attempted murder**
 - **IMMEDIATELY:** instead of requiring B to point and threaten to shoot gun, allows A to kill when B announces that he’s going to get gun and then turns to get it
 - MPC 3.09 (2) **IMPERFECT SELF-DEFENSE:** if A’s belief is unreasonable in a reckless/negligent way, A’s murder charge is mitigated down to manslaughter/negligent homicide
 - **DEFENSE OF ANOTHER:** someone who comes to aid a person in peril can use deadly force to prevent the attack, under the same circumstances that would justify the use of deadly force by the endangered person himself
 - **BYSTANDER DANGER:** if A uses self-defense against B (justified), but creates risk and kills bystanders too
 - “TRANSFER” theory: A’s justified intent to kill B transfers to C, so no liability for death of C (*Fowlin*)
 - MPC 3.09(3): if A is justified in killing B, but “recklessly or negligently injures or creates a risk of injury to innocent persons” A can be prosecuted for manslaughter or negligent homicide
 - **DUTY TO RETREAT:** applies to when faces deadly force *only*, and responds with deadly force *only*
 - **COMMON LAW’s** “true man” rule [MAJORITY 30]: no requirement to retreat from deadly force anywhere
 - **MPC 3.04(b)(ii) [MINORITY 20]:** duty to retreat in face of deadly force if “the actors knows that he can avoid the necessity of using such force with complete safety by retreating” [SUBJECTIVE]
 - Cannot require defendants to engage in calculations about possible degrees of harm, even if “he could escape with something less than serious bodily injury” (*Abbott*)

- “Castle” exception: not required to retreat from one’s home (*Tomlins*)
- **INITIAL AGGRESSOR:** forecloses the self-defense justification
 - **COMMON LAW:** if initial aggressor, no defense at all
 - “Must be without fault” or “without any provoking activity” to use self-defense
 - No matter if using deadly force (easy case) or minor provocation (*Laney, Peterson*)
 - Can even be totally unrelated crime (carrying unregistered firearm, *Mayes*)
 - **MPC 3.04(b)(ii):** only if one provokes with deadly force with the purpose of causing death or serious bodily harm is the self-defense shield revoked
 - Widely rejected by most states, that instead place the risk on the aggressor
- **DEFENSE OF PROPERTY**
 - **MPC 3.06(3)(d):** deadly force not allowed for mere physical protection of property unless:
 - (i) Person attempting to dispossess him of his dwelling, or
 - (ii) Person attempting to commit arson, burglary, robbery, other felonious theft/property destruction and either:
 - (1) Has employed or threatened deadly force against or in presence of actor, or
 - *Sydnor*: complete defense in MPC jurisdiction, cannot separate threat to property from threat to person (robbery was a “continuous transaction”)
 - (2) Use of non-deadly force would expose actor or other person in presence to substantial danger of serious bodily harm
 - (5) Cannot use deadly traps to protect property (*Ceballos*)
 - No discretion, no mercy, no judgment (“silent instrumentalities of death”)
 - **COMMON LAW:** can use non-deadly force to protect from imminent dispossession of personal property
 - Deadly force authorized to protect one’s home
 - Must reasonably believe that person intends the unlawful entry and intends to commit unlawful bodily injury within, and that deadly force is necessary to prevent such an intrusion
 - Differs between states (NY v. TX/CO)
- **NECESSITY:** “choice of evils”
 - Had the legislature thought of person’s particular situation, it would have carved out an exception
 - Present in all states: 19 by statute, rest by common law
 - Elements of defense
 - (1) Crime charged has to be the “**lesser evil**” compared to crime avoided
 - An objective inquiry: would a reasonable person assume this was the lesser evil?
 - Threshold issue determined by judge before going to jury (balance policy concerns)
 - (2) Must be avoiding an **imminent** harm
 - Not required by MPC 3.02
 - (3) Must reasonably anticipate a **direct causal relationship** between crime done to avoid more serious harm
 - (4) **No other legal alternatives** other than violating the law
 - (5) **Legislature** did not anticipate this exact scenario and foreclose the defense
 - AIDS needle distribution (*Leno*) or medical marijuana provisions
 - (6) Situation cannot be of the **defendant’s creation** (“clean hands”)
 - If level of fault is so miniscule compared to harm faced, try to argue for a mitigating factor
 - MPC 3.02(2): defense not available for crimes with a mens rea of recklessness or negligence if the actor was reckless or negligent in bringing about the situation
 - (7) Cannot invoke necessity for **murder**
 - Strict invocation does not allow it as a defense to felony murder even if one has a necessity defense to the underlying felony
 - MPC does allow it
 - (8) Cannot invoke necessity to protect **economic interests**
 - MPC allows a bit more flexibility, but very difficult to win
 - (9) Some states require that situation be created by **natural events**, not a person (which would be duress)
 - *Unger*: allows defense in escape from prison to avoid being raped or killed by assailants
 - Factors for: tried to report to police, nonviolent escape, in prison for auto theft, didn’t create situation, planned to return to prison once he escaped from situation
 - Factors against: immediately steals another car, return plans are dubious, threat wasn’t immediate enough
 - Big policy concerns: creating perverse incentives to escape from prison versus not allowing problems of sexual abuse in jails to surface at all
 - *Lovercamp/Bailey*: allow defense in escape cases but narrow it by requiring person to immediately report to police

- **Schoon**: necessity can never be proven in case of indirect civil disobedience (substantive law being violated is not the one being protested against)
 - No causal link (not going to stop money flowing to El Salvador by vandalizing IRS office)
 - Other legal options (voting, elections)
 - No imminent harm (just an undesirable law or policy)

EXCUSES: because of situation personal to defendant, he is not culpable (but act was still wrong)

- **INSANITY**: a mental state, existing at the time of the criminal offense, that is sufficient to preclude criminal responsibility
 - Rarely invoked, and even more rarely successful
 - Can result in automatic civil commitment (10 states) or a subsequent proceeding with a lower standard of proof, like clear and convincing or preponderance of the evidence (majority)
 - Juries not told of possible consequences when deliberating (*Shannon*)
 - Indefinitely detained until no longer dangerous to oneself or the community
 - **M’Naghten Rule** [MAJORITY]: mental illness must come from a “disease of the mind”
 - (1) Person does not “know the **nature and quality** of the act he was doing” OR
 - (2) If he did know it, “**he did not know that was he was doing was wrong**”
 - An entirely cognitive test
 - **MPC 4.01** [MINORITY]: broadened insanity test, but widely rejected after Hinckley incident (*Lyons*)
 - “A person is not responsible for criminal conduct, if at the time of such conduct as a result of mental disease or defect he:
 - (1) **Lacks the substantial capacity** either to:
 - (i) Appreciate the criminality [wrongfulness] of his act (COGNITIVE PRONG) or
 - (ii) To conform his conduct to the requirements of law (VOLITIONAL PRONG)
- **EXPANSION OF EXCUSES**
 - **Robinson v. California**: struck down CA law that criminalized “being addicted to the use of narcotics” for violating Eighth Amendment’s provision against cruel and unusual punishment
 - Cannot criminalize “status”
 - Akin to punishing a cold, because status brings it in under “involuntary” category
 - **Powell v. Texas**: upholds alcoholic’s conviction for being intoxicated in a public place
 - Refuses to expand **Robinson** reasoning to prohibit criminalization of any involuntary offense due to addiction or alcoholism (echoed in *Moore*)
 - Worried about possibly unlimited expansion of excuses to more violent crimes
 - Do not want to restrict state’s freedom to experiment with excuses related to addiction
 - Powell’s 5th vote: importance of taking precautions when one is addicted
 - NOTE: if a case where an addict has taken adequate precautions, argue that it would be unconstitutional to hold him accountable under narrow reading of **Powell**
- **DURESS**
 - Do not have to balance harms
 - Elements
 - (1) **Imminent** unlawful threat from a **human being** (not a natural source, which would be necessity)
 - Not required by MPC 2.09
 - Many jurisdictions more flexible (*Toscano*)
 - (2) Threat has to be for **serious bodily harm or death**
 - MPC 2.09 only requires a “threat of physical force” to prompt duress
 - No economic or psychological force recognized
 - (3) Threat must be made against oneself, family member, or “other person” (MPC)
 - (4) Such that “a man of ordinary fortitude and courage might justly yield”
 - MPC 2.09: “a person of **reasonable firmness in his situation** would have been unable to resist”
 - An OBJECTIVE test: take into account physical factors, but not emotional ones
 - (5) Cannot invoke duress for **murder** (Minority, 17 states)
 - Majority/MPC: allow it for homicide or reduce charge down to manslaughter
 - (6) Situation cannot be of the **defendant’ creation** (“clean hands”)
 - MPC 2.09(2): defense not available for crimes with a mens rea of recklessness or negligence if the actor was reckless or negligent in bringing about the situation
 - *Note: since duress is an excuse (not justification), third parties don’t get benefit of defense (would need necessity to get the shield)

SENTENCING

- Needs to be linked to purposes of punishment: deterrence, retributive justice, incapacitation, rehabilitation
- Alternative punishments (*Gementera*) need to be sufficiently linked to crime committed and have a rehabilitative/expressive goal
- **DISCRETIONARY SYSTEM** (*Williams v. NY*): judge has complete discretion to set sentence, can look at pre-sentence report, take in all relevant factors
 - Abrogated for death penalty cases (*Gardner v. FL*)
- **MANDATORY MINIMUMS**: shift discretion from judge to prosecutor in deciding which charge to bring (*Vazquez*)
 - Declared unconstitutional because they're offense elements that must be proven at trial (*Booker*) – now only advisory
- **PROCEDURE**
 - (1) Judge looks at guidelines, locates punishment range
 - (2) Is the case “outside the heartland” of cases considered by Commission?
 - Prior to 2005, analysis stopped here
 - (3) Even if a “heartland case,” is it okay to depart because the suggested punishment would not serve the aims of punishment laid out in § 3353:
 - The court should impose a sentence sufficient, but not greater than necessary, that:
 - (a) Reflects the seriousness of the offense, to promote justice for the law, and to provide just punishment for the offense [RETRIBUTIVE]
 - (b) To afford adequate deterrence to criminal conduct [UTILITARIAN]
 - (c) To protect the public from further crimes of the defendant [INCAPACITATION]
 - (d) To provide the defendant with needed educational or vocational training...[REHABILITATIVE]
 - Standard of appellate review of step 3 is “substantive reasonableness”

PROPORTIONALITY

- **As-applied challenge**: “The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only *extreme* sentences that are ‘*grossly disproportionate*’ to the crime” (*Harmelin*, quoted in *Ewing v. CA*)
 - Threshold inquiry: does state have a reasonable basis for believing that this sentence will serve a goal of punishment (deterrence, retribution, incapacitation, rehabilitation)
 - If yes, court upholds sentence (*Ewing*)
 - If get past *Harmelin*: compare offense to other more serious offenses with shorter prison terms, to other jurisdictions
- **Categorical challenge** (*Graham v. FL*): skips *Harmelin* threshold inquiry, proceeds straight to phase two
 - (1) Objective indicia of society’s standards (legislation, actual sentencing practices)
 - (2) Court’s independent judgment
 - Culpability of the offender *class* (juveniles, mental retardation)
 - Level of the *offense* (murder, rape)
 - Nature of the *punishment* (life without parole, life sentence)
 - Does sentence serve penal goals? (incapacitation can’t trump everything else)
 - Role of international law